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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-539

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

OBJECTION OF THE UNITED STATES TO THE MOTION OF CRAIG CORPORATION, ET AL., FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The United States did not consent to the filing of the brief of Craig Corporation, et al., as amici curiae. Because amici suggest that this action is "symptomatic" of either hostility or some other improper reason (Br. 2-3, 13-14), we file this objection to state the reasons why the United States did not consent. See Rule 42(3) of the Rules of this Court.

Amici contend that the procedures for judicial review of decisions not to assess countervailing duties are unconstitutional because they do not afford notice and an opportunity for a hearing to all persons who might be affected by the decisions. This contention has not been made by any party to the case and was not presented in the petition for a writ of certiorari. It therefore is not open now. See Rules 40(2) and 42(5) of the Rules of this Court. See also, e.g., Quilloin v. Walcott, No. 76-6372, decided January 10, 1978, slip

op. 7 n. 13; Dothard v. Rawlinson, 433 U.S. 321, 323 n. 1. We declined to consent to the filing of the brief by amici because the issue had not been raised at any earlier point in the litigation and because we would be unable to respond to any arguments amici might make.

Nothing in the procedures for judicial review of countervailing duty cases is so unfair to amici that this Court should now consider the arguments they advance. It is commonplace that the outcome of litigation may influence the rights of numerous persons because of the dostrine of stare decisis. But the existence of potentially widespread consequences does not require that all potentially affected persons be given notice and a separate hearing -- it does not require, in other words, that every case be treated as a class action under Fed. R. Civ. P. 23(b)(1). Persons ordinarily may seek to protect their interests by intervening (see Fed. R. Civ. P. 24) or by appearing as amici curiae to make any arguments that the parties may neglect.

The civil rules do not govern proceedings in the Customs Court, and that court has held that intervention is not allowed as of right. But if there is any flaw of constitutional magnitude in the procedures for the determination of customs duties (and we do not think that there is), it is in the rule against intervention, not in 19 U.S.C. (Supp. V) 1516. Amici could have attempted to intervene in the Customs Court. If intervention had been granted, they would have been able to make any appropriate arguments concerning the proper construction of the countervailing duty statute. And if intervention had been denied, they could have appealed, arguing that the denial of intervention deprived them of a right to a judicial hearing. Moreover, they could have appeared as amici curiae in the Customs Court and the Court of Customs and Patent Appeals and made both their substantive arguments and their objections to the procedure under

Section 1516. Amici did not seek to intervene, however, and they did not appear as amici curiae in the lower courts. We believe that it is now too late for them to raise constitutional objections to Section 1516.

It is therefore respectfully submitted that the motion for leave to file a brief as amici curiae should be denied.

WADE H. McCREE, JR.,
Solicitor General.

APRIL 1978.